NO. PD-12-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

THE STATE OF TEXAS,
Appellant

v.

DWAYNE ROBERT HEATH,
Appellee

From the Tenth Court of Appeals
Cause No. 10-18-00187-CR

APPELLEE DWAYNE ROBERT HEATH'S BRIEF

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Identity of Judge, Parties and Counsel

Appellant, pursuant to Rules of Appellate Procedure 38.1(a) and 68.4(a), provides the following list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel.

THE TRIAL COURT:

Matt Johnson — Trial Court Judge
54th District Court, McLennan County
501 Washington Ave., Ste. 305
Waco, Texas 76701

THE DEFENSE:

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Statement of the Case

The trial court granted Appellee's motion to exclude a 9-1-1 recording because of the State's failure to produce the recording until 424 days after Appellee requested discovery and less than a week before trial. (CR58, 86-90), (RR14) The State pursued an interlocutory appeal. (CR61-64) The court of appeals reversed, holding that Appellee's discovery request was inadequate to invoke the requirements of the Michael Morton Act. This Court granted review.

Statement Regarding Oral Argument

The Court has advised the parties that oral argument will be permitted. Appellee requests oral argument because he believes that oral argument will aid the Court's decisional process and clarify the issues presented.

Grounds Presented

1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?

2. Was Appellee's discovery request sufficient under the Michael Morton Act?

3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?

Statement of Facts

A grand jury returned an indictment against Appellee Dwayne Robert Heath alleging that he committed the offense of injury to a child on or about November 5, 2016. The indictment was docketed under cause no. 2017-241-C2. (CR5)

A 9-1-1 call had been made on or about November 5, 2016 regarding the alleged offense. Law enforcement has maintained a recording of this 9-1-1 call since it was made. (CR86—FF2)[1]

Heath requested discovery from the Office of the Criminal District Attorney of McLennan County on March 20, 2017. (CR86—FF4) He requested discovery by an email with the subject heading "Dwayne Heath" that read as follows:

> Can I get discovery on this client?
>
> Cause #2017-241-C2

(CR53)

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[1] At the State's request, the trial court entered findings of fact and conclusions of law that appear at pages 86-90 of the clerk's record. Heath refers to the specific findings or conclusions by a citation to the page in the clerk's record where the cited finding appears followed by a reference to the numerical designation for the cited finding. For example, the citation to Finding of Fact No. 2 on page 86 of the clerk's record is as follows: (CR86—FF2).

This case first appeared on the trial court's pretrial docket on September 29, 2017, and on the status conference docket one week later on October 6, 2017. (CR87—FF6)

The parties appeared for trial on October 16, 2017, but the case was rescheduled to a later pretrial setting because another case went to trial that week. (CR87—FF7)

This case again appeared on the pretrial docket on January 5, 2018, and on the status conference docket one week later on January 12, 2018. (CR87—FF8)

The parties appeared for trial on January 22, 2018, but the case was rescheduled to a later pretrial setting because another case went to trial that week. (CR87—FF9)

This case again appeared on the pretrial docket on February 9, 2018, and on the status conference docket one week later on February 16, 2018. (CR87—FF10)

The parties appeared for trial on February 26, 2018, but the case was rescheduled to a later pretrial setting because another case went to trial that week. (CR87—FF11)

This case again appeared on the pretrial docket on May 11, 2018, and on the status conference docket one week later on May 18, 2018. (CR87—FF12)

The prosecutor failed to ascertain the existence of the 9-1-1 recording by the first pretrial setting on September 29, 2017. (CR87—FF13)

The prosecutor failed to ascertain the existence of the 9-1-1 recording for the settings on October 6, 2017, October 16, 2017, January 5, 2018, January 12, 2018, January 22, 2018, February 9, 2018, February 16, 2018, February 26, 2018, May 11, 2018 and May 18, 2018. (CR87—FF14)

The prosecutor first learned that the recording existed after meeting with a witness on May 18, 2018. She then requested a copy of the recording from the McLennan County Sheriff's Department. (CR88—FF15)

The prosecutor furnished a copy of the recording to defense counsel on May 23, 2018. (CR88—FF16, 17)

The parties appeared for trial on May 29, 2018 at which time the trial court sustained Heath's motion to exclude the recording. (CR73), (RR14)

Summary of the Argument

The State appealed the trial court's discovery sanction order excluding the 9-1-1 recording. The court of appeals reversed after finding that Appellee Heath's emailed discovery request was insufficient to invoke the requirements of the Michael Morton Act (the "MMA"), particularly with respect to the 9-1-1 recording.

The court of appeals erred by reversing the trial court's order on a theory that was not preserved by the State at trial or assigned as error by the State on appeal.

The court of appeals held that Heath's emailed discovery request was insufficient because it did not include a reference to article 39.14 and because it did not designate the items for which discovery was sought. However, because there is no other legal basis for obtaining discovery in a criminal case than article 39.14, Heath did not need to include a statutory reference in his discovery request. And the statute does not require designation of items for which discovery is sought because the MMA created a uniform, statewide open-file discovery policy. Further, a designation requirement is contrary to the legislative intent set forth during the enactment of the MMA.

Finally, the State is estopped to complain of the adequacy of Heath's discovery request because it furnished discovery (including the disputed 9-1-1 recording) in response to the request. The court of appeals cannot grant relief on an issue which the State is estopped to raise on appeal.

Argument

1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?

An appellate court may not reverse a trial court order on a basis not raised in the trial court or on appeal. Here, the court of appeals reversed the trial court's discovery sanction order on the theory that Heath's discovery request was inadequate to invoke the requirements of the Michael Morton Act ("MMA"). But the State did not challenge the adequacy of the request at trial or on appeal. The court of appeals erred by reversing on a basis not preserved by trial objection or assigned as error on appeal.

A. The appealing party must preserve its appellate complaints.

Decades ago, this Court recognized a right of appellate courts to address issues of fundamental error that were not preserved by trial objection. *E.g., Carter v. State*, 656 S.W.2d 468, 468-70 (Tex. Crim. App. 1983).

The Court has since concluded that there is no common-law category of fundamental errors that may be reviewed on appeal without preservation. *See Proenza v. State*, 541 S.W.3d 786, 793-97 (Tex. Crim. App. 2017). Rather, the Court employs the *Marin* formulation to determine what issues must be

preserved for appellate review. *Id.* at 794; *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004).

Under *Marin*, the Court identified three categories of errors and concluded that only the third category is subject to procedural default. *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). Those categories are:

1) absolute requirements and prohibitions;

2) rights of litigants which must be implemented by the system unless expressly waived; and

3) rights of litigants which are to be implemented upon request.

Id.

The right at issue here is the State's right to complain of the adequacy of a discovery request. This is a right that can be implemented only if the State requests its implementation. Thus, it is a Category 3 right under *Marin*.

Stated differently, a litigant in a criminal case (State or defendant) may pick and choose those issues about which it chooses to object at trial. For strategic or other reasons, litigants frequently choose not to lodge objections at trial though there is an arguable basis for doing so. Here, the State failed to do so.

An appealing party must preserve for appellate review complaints that fall under *Marin*'s third category. *Marin*, 851 S.W.2d at 279. This requires the party to make a timely objection or request and obtain an adverse ruling. TEX. R. APP. P. 33.1(a); *Golliday v. State*, 560 S.W.3d 664, 669 n.16 (Tex. Crim. App. 2018). If the party fails to preserve such a complaint, it may not be raised on appeal. *Marin*, 851 S.W.2d at 280.

B. An appellate court may only consider preserved complaints.

Generally, an appealing party must "assign error" by specifying issues or points in the appellant's brief it wants the appellate court to consider. *See id.* 38.1(f). However, an appellate court may nevertheless consider "unassigned error," **but only if it was preserved in the trial court.** *Sanchez v. State*, 209 S.W.3d 117, 120-21 (Tex. Crim. App. 2006).

Because the State did not object to the adequacy of Heath's discovery request at trial, the adequacy of this request is an unpreserved issue. Further, the State did not present an issue on appeal challenging the adequacy of the request. Therefore, because this constitutes "unassigned error," the court of appeals erred to address this issue because it was not preserved in the trial court. *Id.*

C. An appellate court may not reverse based on unpreserved theories.

Consistent with the above principles, "[I]t is improper for an appellate court to reverse a case on a theory not raised at trial or on appeal." *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006). Stated differently, an appellate court may not "reach out and reverse the trial court on an issue that was not raised." *Id.* at 744.

Here, the court of appeals reversed the trial court's discovery sanction order under the theory that Heath's discovery request was inadequate to invoke the requirements of the Michael Morton Act. *State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945, at *2 (Tex. App.—Waco Oct. 31, 2018, pet. filed). But the State did not challenge the adequacy of the request at trial or on appeal. Because the State did not object at trial to the form of Heath's discovery request, the issue was not preserved, and the Court of appeals erred by reversing on this basis. *Bailey*, 201 S.W.3d at 743-44.

D. This Court should reverse and remand.

The court of appeals erred by addressing an issue not preserved by the State in the trial court or assigned as error on appeal. Accordingly, this Court should reverse the judgment of the court of appeals and remand this cause

to that court to address the merits of the State's appeal. *See* TEX. R. APP. P. 78.1(d).

2. Was Appellee's discovery request sufficient under the Michael Morton Act?

Heath emailed a request for "discovery" to the prosecuting attorney that identified his name and the cause number of his case. The court of appeals held that this was insufficient to invoke the State's responsibilities under the MMA because it did not specify the statute under which the request was made and did not designate the items sought. Neither is required by the MMA. The court of appeals erred by holding otherwise.

A. The Court has jurisdiction to address this ground for relief.

As a preliminary matter, Heath addresses the Court's authority and jurisdiction to address this ground for relief. A decision in his favor on the first or third grounds arguably renders this ground moot. *Cf. Garcia v. State*, 15 S.W.3d 533, 537 n.6 (Tex. Crim. App. 2000) (declining to address one ground for review in light of ruling on other ground). Regardless, Heath urges the Court to address this ground because it goes to the heart of this appeal, the Court granted review on this ground, and the issue presented impacts literally every pending criminal case in the State of Texas.

Article V, section 5 of the Texas Constitution defines this Court's jurisdiction. Specifically, the Court has jurisdiction "as prescribed by law."

TEX. CONST. art. V, § 5(a). The Court also has jurisdiction under the Constitution to "review a decision of a Court of Appeals in a criminal case as provided by law. *Id.* art. V, § 5(b).

Article[2] 44.45 further prescribes this Court's jurisdiction to review decisions of the courts of appeals in criminal cases by discretionary review. TEX. CODE CRIM. PROC. art. 44.45; *see also* TEX. R. APP. P. 66, 67, 68, 69.

Thus, the Court's granting of a petition for discretionary review (and particularly grounds on which review is granted) defines the scope of the Court's review and the matters that are before the Court for decision. 43B GEORGE E. DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 57:35 (3d ed. 2011).

Further, the Court's jurisdiction to review "decisions" of the courts of appeals necessarily means that the Court has jurisdiction to review only issues that have been actually decided by the court of appeals in a particular case. *See Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007).

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[2] The term "article" refers to an article of the Code of Criminal Procedure unless otherwise indicated.

Here, the Court has jurisdiction to address the propriety of Heath's discovery request because: (1) the Court granted review on this issue; and (2) the Court of Appeals ruled on the propriety of the discovery request.

B. Alternatively, the Court should apply the public-interest exception to the mootness doctrine and address this ground.

If the Court considers this ground moot in view of its rulings on another ground for review, Heath urges the Court to nevertheless address this ground under the public-interest exception to the mootness doctrine.

Several Texas intermediate appellate courts and a significant majority of the other states recognize a public-interest exception to the mootness doctrine. Heath urges the Court to do so here because the Court has the discretion to do so, the public interests at stake are significant, and the issue presented does not meet the requirements of other exceptions to the mootness doctrine.[3]

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[3] The capable-of-repetition-yet-evading-review exception is arguably the most well-known of the exceptions to the mootness doctrine. This exception applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Pharris v. State*, 165 S.W.3d 681, 688 (Tex. Crim. App. 2005) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). It does not appear that the adequacy of Heath's discovery request satisfies either of these requirements, particularly the second one. The other exception, collateral consequences, likewise does not apply. *See Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006) ("collateral consequences exception to the mootness doctrine is invoked only

The Austin Court was one of the early courts to adopt the public-interest exception in Texas. This exception "allows appellate review of a question of considerable public importance if that question is capable of repetition between either the same parties or other members of the public but for some reason evades appellate review." *UIL v. Buchanan*, 848 S.W.3d 298, 304 (Tex. App.—Austin 1993, no writ). Other Texas courts have also applied this exception. *E.g. In re Guerra*, 235 S.W.3d 392, 432 n.198 (Tex. App.—Corpus Christi 2007, orig. proceeding); *Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 810-11 (Tex. App.—Texarkana 2003, pet. denied). The San Antonio Court has declined to expressly adopt this exception but considered its application in a criminal appeal. *See Jasper v. State*, No. 04-05-00907-CR, 2006 WL 2871334, at *1 (Tex. App.—San Antonio Oct. 11, 2006, pet.) (mem. op., not designated for publication). The Texas Supreme Court has likewise not expressly adopted this exception but considered its application and agreed with the lower court that it did not apply. *See FDIC v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994).

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under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment").

As of 2009, the highest courts in 43 states had adopted the public-interest exception. Lauren Waite, Note, *The Public Interest Exception to Mootness: A Moot Point in Texas?*, 41 TEX. TECH. L. REV. 681, 691 (2009).

Courts in other states have taken two approaches when applying this exception. *Id.* The first approach is similar to that articulated by most Texas courts. It permits an exception to the mootness doctrine only for "situations in which the public interest involved is great, sufficient, vital, continuing, general, substantial, broad, or extreme." *Id.* at 691-92.

The second approach utilizes various factors, including:

- whether the issue is of a public or private nature;
- whether an authoritative determination is desirable to provide future guidance to public officers;
- whether the issue is likely to recur.

Id. at 692 (quoting *Westerman v. Cary*, 892 P.2d 1067, 1072-73 (Wash. 1994)).

The exception is limited to cases where a statewide interest exists. *Id.* at 693 (citing *Smith v. Martens*, 106 P.3d 28, 32 (Kan. 2005)). Additionally, some "states courts have looked more favorably towards reaching a decision on the merits when resolution of an issue will provide future guidance." *Id.* at 694. Many states consider whether the decision will guide the behaviors

of public officials (including attorneys). *Id.* New York has applied the exception "when a decision will help government officials interpret state policy in the future." *Id.* (citing *Nat'l Org. for Women v. State Div. of Human Rights*, 314 N.E.2d 867, 868 (N.Y. 1974)).

Accordingly, this Court should rely on the public-policy exception to the mootness doctrine and address the merits of this second ground for review. The Court should do so because the issue presented is: (1) an issue of "considerable public importance"; (2) capable of repetition among thousands of members of the public who are subjected to criminal prosecution ; and (3) which evades appellate review for numerous reasons including the sheer impracticality of the court system to be able to review the thousands of cases potentially impacted. *See Buchanan*, 848 S.W.3d at 304.

Further,

- the issue presented is of a public nature;
- an authoritative determination is desirable to provide future guidance to public officers;
- the issue is likely to recur; and
- a statewide interest exists.

Id. at 692-94.

For each of these reasons, the Court should apply the public-interest exception.

C. The MMA does not require a statutory reference.

The MMA requires the State "as soon as practicable after receiving a timely request from the defendant" to produce the discovery materials identified in the statute. TEX. CODE CRIM. PROC. art. 39.14(a).

The court of appeals faulted Heath for not referring to the statute in his discovery request. *See Heath*, 2018 WL 5660945, at *2. Yet no general right to discovery exists in criminal cases aside from the MMA. *See Quinones v. State*, 592 S.W.2d 933, 940 (Tex. Crim. App. 1980). Heath's request for "discovery" was necessarily a request for discovery under the statute.

Because there is no other legal basis for obtaining discovery in a criminal case than article 39.14, Heath did not need to include a statutory reference in his discovery request. The court of appeals erred by holding otherwise.

D. The MMA does not require designation of discovery sought.

The court of appeals primarily faulted Heath for not designating the items sought to be produced.[4] *See Heath*, 2018 WL 5660945, at *2. But this is directly contrary to the intent of the MMA which established a uniform, statewide system of open-file discovery.

Specifically, the MMA requires disclosure of:

> any offense reports, any **designated** documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any **designated** books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

TEX. CODE CRIM. PROC. art. 39.14(a) (emphases added). Because the term "designated" is interspersed amid several series of items subject to discovery, the statute is ambiguous with respect to its designation requirement.

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[4] Insofar as Heath can determine, the Waco and Amarillo Courts are the only ones to hold that the MMA requires designations in discovery requests. *See State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945, at *2 (Tex. App.—Waco Oct. 31, 2018, pet. filed); *Hinojosa v. State*, 554 S.W.3d 795, 796-98 (Tex. App.—Waco 2018, no pet.); *Davy v. State*, 525 S.W.3d 745, 750 (Tex. App.—Amarillo 2017, pet. ref'd).

Further, a designation requirement leads to the absurd result of defense counsel having to request a laundry list of every conceivable item that may exist in case (as here) an item exits that defense counsel is unaware of.[5] This is a particularly absurd result given that the Legislature enacted the Michael Morton Act because the State had withheld significant exculpatory evidence[6] that ultimately led to Mr. Morton's exoneration. *See* Alex Samuels,

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[5] Consistent with its decision in *Watkins* (No. PD-1015-18) for which this Court has also granted review, the court of appeals apparently chose to exercise some form of judicial restraint in construing the MMA by relying *sub silentio* on pre-MMA decisions. This Court did impose a "designation requirement" for discovery motions under the former version of article 39.14. *E.g.*, *Feehery v. State*, 480 S.W.2d 649, 651 (Tex. Crim. App. 1972); *Sonderup v. State*, 418 S.W.3d 807, 808 (Tex. Crim. App. 1967). And the Legislature retained much of the language from the former statute in subdivision (a). But the lower court's approach failed to give effect to the substantial amendments not only to article 39.14(a) but also to the remainder of the statute (such as the addition of 12 entirely new subdivisions) that collectively indicate that the Legislature intended a substantial change in criminal discovery practice in Texas.

[6] According to the account in the *Texas Tribune*:

> Among [the items of withheld evidence] was a transcript of a phone call in which Morton's mother-in-law recounted to police a conversation with her 3-year-old grandson, who said he saw a "monster" beat his mother to death. He said his father was not at home when the beating happened. Defense lawyers also found a report that Christine Morton's credit card had been used in San Antonio days after her murder. And they found reports from neighbors who told police that they saw a man in a green van park near the Mortons' home several times before the crime.

Alex Samuels, *Morton's Conviction Comes to Define Former Williamson County DA*, TEX. TRIBUNE (Feb. 3, 2013), https://www.texastribune.org/2013/02/03/tough-crime-prosecutor-set-rare-court-inquiry/ (last visited May 9, 2019).

Morton's Conviction Comes to Define Former Williamson County DA, TEX. TRIBUNE (Feb. 3, 2013), https://www.texastribune.org/2013 /02/03/tough-crime-prosecutor-set-rare-court-inquiry/ (last visited May 9, 2019).

The Court should review the legislative history of the Michael Morton Act because the statute is ambiguous and because applying the plain language of the statute would lead to an absurd result the Legislature could not have intended.

If a statute is ambiguous,[7] or the plain meaning would lead to absurd results, the Court may consider: (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) legislative history; and (4) the consequences of a particular construction. *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017) (citing TEX. GOV'T CODE § 311.023) (other citation omitted). Though not a preferred practice, the Court may also consider such matters even if the statute is unambiguous. TEX. GOV'T CODE § 311.023.

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[7] "Ambiguity exists when reasonably well-informed persons may understand the statutory language in two or more different senses." *Long v. State*, 535 S.W.3d 511, 521 (Tex. Crim. App. 2017).

Various bill analyses prepared in conjunction with the enactment of the MMA confirm that it was intended to create a uniform, statewide system of open-file discovery in criminal cases. Open-file discovery, by definition, requires disclosure of everything (not otherwise privileged) in the State's file (without the need to submit an itemized request). For example,

> Interested parties observe that a U.S. Supreme Court ruling requires prosecutors to turn over to the defense any evidence that is relevant to the defendant's case, but express concern that the ruling is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. The parties contend that such inconsistency demonstrates a need to change the state's criminal discovery laws **to ensure uniformity throughout Texas**.
>
> Concerned parties cite several reasons why a **uniform open file discovery process** is important. The parties contend that it promotes efficiency in the criminal justice system and lessens the likelihood of discovery disputes, costly appeals, and wrongful convictions.

House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, at 1, Tex. S.B. 1611, 83d Leg. (2013) (emphases added).

Various commentators and practitioners agreed.

- "[The Act] creates an open file policy, obviating the need for the defense team to continue requesting discovery." Cynthia E. Hujar Orr and Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 414 (2015)

- "This new law has changed criminal discovery dramatically by codifying open-file policies." Randall Sims and R. Marc Ranc, *Two Views of Morton: When the Michael Morton Act Took Effect in January 2014, It Changed the Way Criminal Cases Are Handled in Texas – and How Prosecutors and Defense Attorneys Work*, 77 Tex. B.J. 964, 964 (2014) (prosecutor's perspective)

- "What has the Morton Act brought the criminal defense bar? Throughout Texas, all prosecuting attorneys must now have mandatory open-file discovery." *Id.* at 966 (defense attorney's persective)

The 83rd Legislature achieved its objective by enactment of the MMA.

The "designation requirement" imposed by the court of appeals places a burden on defense counsel to speculate and guess what evidence the State may possess and then request it. Ultimately, the Court's decision requires defense counsel in every case to submit a request to the prosecutor listing all conceivable items that might be discoverable. This is precisely the opposite of what the Legislature intended when it enacted a uniform, statewide open-file discovery policy through the MMA.

Nevertheless, the MMA admittedly uses the term "designated." The Court must thus assign some meaning to this terminology employed by the Legislature. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) (court must give effect to every word in statute "if reasonably possible").

Heath suggests the following construction. First, on receipt of a discovery request, the State must furnish "any (1) offense reports, . . . (2) documents, (3) papers, (4) written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, . . . (5) books, (6) accounts, (7) letters, (8) photographs, or (9) objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state." *See* TEX. CODE CRIM. PROC. art. 39.14(a).

After the State furnishes these items to defense counsel, defense counsel may discover the existence of other discoverable matters, such as lab reports or witness statements that the State has (inadvertently or otherwise) failed to disclose. Defense counsel may then serve a supplemental request for discovery designating such additional items that are subject to discovery.

The undersigned counsel has also submitted supplemental discovery requests designating particular items in the context of evidence regarding extraneous offenses. Once the State furnishes notice of its intent to offer evidence of extraneous offenses, counsel usually files a supplemental

discovery request for offense reports, witness statements and photographs related to the extraneous offenses about which the State has given notice. Counsel does so because the State's extraneous-offense notice makes the extraneous offenses (and the offense reports and other items related to them) "material to [a] matter involved in the action." *See id.*

E. The court of appeals erred by requiring a statutory reference or designation of discovery sought.

The court of appeals erred by holding that Heath's discovery request was inadequate for not including a statutory reference because no general right to discovery exists in criminal cases aside from the MMA. His request thus necessarily requested discovery under the statute.

The court of appeals also erred by holding that Heath's discovery request was inadequate because it did not designate the discovery sought. The MMA established open-file discovery. No designation is required.

F. This Court should reverse and remand.

The court of appeals erred by finding Heath's discovery request inadequate. Accordingly, this Court should reverse the judgment of the court of appeals and remand this cause to that court to address the merits of the State's appeal. *See* TEX. R. APP. P. 78.1(d).

3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?

A party may be estopped from asserting a claim on appeal that is inconsistent with the party's conduct at trial. Here, the State (belatedly) produced the disputed 9-1-1 recording in response to Heath's discovery request without asserting any objection to the form of the request. The State is thus estopped to challenge the propriety of that discovery request. The court of appeals erred by failing to address Heath's estoppel claim and by reversing on a theory the State is estopped to assert.

A. A party may be estopped on appeal by its conduct at trial.

"[A] party may be estopped from asserting a claim that is inconsistent with that party's prior conduct." *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003).

In *Arroyo*, this Court held that the State was estopped from challenging the admissibility of certified copies of a complainant's prior criminal judgments and similar documents that were obtained and offered based on a rap sheet provided to the defense by the prosecutor. *Id.*

B. The State is estopped because it did not object to the request.

Here, the State furnished a copy of the 9-1-1 recording to Heath because of his discovery request. The State did not furnish this copy "subject to" any objections, and the State did not otherwise object to the propriety of Heath's discovery request. Therefore, the State is estopped to challenge the adequacy of the request. *Id.* The court of appeals erred by granting relief to the State on an issue that the State is estopped to raise.

C. The court of appeals erred by failing to address the estoppel issue.

Heath raised this estoppel issue in his brief (and in his motion for rehearing), yet the court of appeals failed to address it.

Rule of Appellate Procedure 47.1 requires an appellate court to address "every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1; *see Keehn v. State*, 233 S.W.3d 348, 349 (Tex. Crim. App. 2007) (per curiam).

Heath specifically argued in footnote 3 of his brief that the State was estopped to contend that the recording was not subject to disclosure because the State furnished a copy of the recording pursuant to his discovery request. This argument likewise forecloses the State's ability to challenge the adequacy of the discovery request.

Heath further addressed the issue in his motion for rehearing, arguing specifically, as here, that the court of appeals could not grant relief on an issue the State was estopped to assert.

The court of appeals erred by not addressing this estoppel argument. *Id.*

D. This Court should reverse and remand.

The court of appeals erred by failing to address the estoppel issue and by granting relief on an issue that the State was estopped to assert.

Accordingly, this Court should reverse the judgment of the court of appeals and remand this cause to that court to address the merits of the State's appeal. *See* TEX. R. APP. P. 78.1(d).

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellee Dwayne Robert Heath asks the Court to: (1) reverse the judgment of the court of appeals and remand this cause to that court for further proceedings; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 6,621 words.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this brief was served electronically on May 10, 2019 to: (1) counsel for the State, Sterling Harmon, sterling.harmon@co.mclennan.tx.us; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett